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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 1070

CARLOS MARCELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES.

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No.

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v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming a denial of a petition in the nature of a writ of coram nobis to set aside petitioner's conviction which furnishes a basis for his deportation.

Opinions Below

The opinion of the Court of Appeals is reported at 328 F. 2d 961 and is set forth in the Appendix at pp. 31-32. The District Court's opinion and decree is reported at 210 F. Supp. 892 and is set forth in the Appendix at pp. 19-30.

Jurisdiction

The judgment of the Court of Appeals was entered on March 12, 1964. By order of Mr. Justice Black, the time for the petitioner to file his petition was extended to May

11, 1964. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the issue of entrapment can be raised in a coram nobis or post conviction proceeding or whether it is precluded by a guilty plea.

2. Whether the burden of proof in a coram nobis proceeding is "affected and magnified by lapse of time" and whether such lapse of time or laches can be utilized to discredit petitioner's case.

3. Whether a judgment of conviction filed on October 28, 1938, one day before the date of its rendition (October 29, 1938) can be accorded a strong presumption of regularity where there is no finding that the filing date was erroneous.

4. Whether petitioner was afforded a fair hearing upon his coram nobis application where the District Court gave conclusive weight to an exhibit (Government's Exhibit 18) which was not introduced in evidence, to office practice of short and uncertain duration, and to inadmissible opinion evidence.

Statute Involved

Section 1651(a) of 28 U. S. C. provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Statement

Petitioner, a fifty-four-year-old native of Tunis, who came to the United States at the age of eight months, was re-

moved illegally to Guatemala for a brief period[1] and is again the subject of deportation proceedings upon the basis of an unusual conviction. On October 29, 1938, he was sentenced in the United States District Court for the Eastern District of Louisiana to a year and a day for transferring marihuana to one Gilmore Failor, a Government agent, in violation of 26 U. S. C. 1399(c) and (g) (R. 6-9). The judgment of conviction is dated on a Saturday, October 29, 1938, and recites that petitioner appeared on that date by counsel. However, the judgment bears a filing date of the day before, October 28, 1938, in the handwriting of Deputy Clerk Lewis who certified it as a true copy on October 29, 1938 (R. 6-7). No finding was made herein that the filing date was erroneous.

Application was made by petitioner in the United States District Court for the Eastern District of Louisiana on

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[1] Petitioner's deportability was sustained by a divided vote of this Court in *Marcello* v. *Bonds*, 349 U.S. 302 (1955). Despite the acknowledgment in that case and in all other judicial and administrative proceedings that Marcello was born in Tunis, the Department of Justice fraudulently represented to Guatemala that Marcello was a native and citizen of Guatemala, secured a reentry permit from Guatemala reciting such facts, and deported Marcello to Guatemala on April 4, 1961. Subsequently, Guatemala expelled Marcello upon the ground that he was not entitled to enter that country. After being kept for five days incommunicado in San Salvador, Marcello made his way back here, around June of 1961. He is under indictment for this return to the United States. See *Marcello* v. *Kennedy*, 312 F. 2d 874 (D.C. Cir., 1962).

The Government, and in particular the Immigration Service was well aware that Marcello was not a native or citizen of Guatemala at the time he was hurriedly removed there. One Carl Noll, for whose truthfulness the Government vouches, and who has been utilized as a Government witness in at least two recent conspiracy prosecutions, advised the Immigration Service on January 6 and 7, 1960, that he, Carl Noll, arranged for the creation of a false Guatemalan birth certificate in Marcello's name. This forgery was knowingly utilized by the Department of Justice to deport Marcello to Guatemala.

In June of 1961 a second deportation proceeding was instituted against Marcello upon the basis of his 1938 marihuana conviction (R. 10).

September 5, 1961 (R. i), after his return from Guatemala and the institution of a second deportation proceeding, for relief in the nature of a writ of coram nobis to set aside his 1938 conviction. Petitioner asserted that he was entrapped into making a transfer to a Government agent, Gilmore Failor (R. 8-9). The District Court ruled that petitioner was precluded from raising this issue by reason of his guilty plea and no evidence was taken thereon. *United States* v. *Marcello*, 202 F. Supp. 694, 697, note 6 (1962). The only issue tried below was whether petitioner was represented by an attorney, Warren O. Coleman (now deceased), on the date of his guilty plea and sentence.

Petitioner was indicted on April 25, 1938, entered a plea of not guilty on May 2, 1938, and his case was thereafter postponed indefinitely on motion of the Government (R. i). He testified that thereafter he changed his plea to guilty because he had no money to fight the case (R. 345) and that he appeared in Court to so plead accompanied by his brother-in-law and one Jerry Wood (R. 181, 308-9). He had no attorney nor was he advised of his right to counsel (R. 309, 347). Jerry Wood, who knew attorney Warren O. Coleman, testified that Coleman was not in Court on the day Marcello pleaded guilty (R. 182, 302-3).[2] Paul Seidler, Chief Probation and Parole Officer of the District Court at the time, likewise confirmed the absence of any attorney at the time of the sentence (R. 172-5, 281).

The Government's main witness in opposition to the application was Judge J. Skelly Wright who testified that he was an Assistant United States Attorney in 1938 and was in charge of this case. He had, however, no independent recollection of the case or of the sentencing of Marcello on October 29, 1938 (R. 413-5). He identified

[2] It was stipulated by the parties that no stenographic record was made or kept of the proceedings of October 29, 1938 (R. 176-6).

Government Exhibit 18 a parole report dated October 29, 1938, but again acknowledged that he had no independent recollection of having prepared it (R. 414). On the basis of Exhibit 18, which states that Warren O. Coleman was defense attorney, and over objections, Judge Wright gave opinion testimony that Marcello was represented by Warren O. Coleman on the date involved herein (R. 415-7).

Upon cross-examination Judge Wright acknowledged that Exhibit 18 does not in terms show that Marcello changed his plea to guilty, nor that Warren O. Coleman appeared on October 29, 1938 (R. 425, 432). Exhibit 18 (R. 140) was not introduced in evidence, but only marked for identification (R. 413). The District Court ruled that Exhibit 18, together with Judge Wright's testimony as to the practice of his office "conclusively shows that Warren O. Coleman was present with Marcello as his counsel at the time of sentence" (R. 28). He also held that the burden of proof was "affected and magnified by the lapse of time" (R. 28), and that Marcello's testimony was discredited *inter alia*, because of his alleged long period of silence (R. 21). Without any reference to the filing date of October 28, 1938, the District Court concluded that petitioner had not overcome the strong presumption of regularity of the judgment of October 29, 1938 (R. 29). The Court of Appeals affirmed, stating that the District Court had applied the proper burden of proof and that all remaining issues related to credibility.

Reasons for Granting the Writ

The decision below raises important issues as to the nature of the defense of entrapment and whether such defense may be raised as a post conviction proceeding or whether it is barred by a guilty plea. It presents issues of recurring significance in coram nobis proceedings as to whether laches or lapse of time may affect the burden of

proof and credibility and "in effect make a dead letter of the ancient writ." *Hancock* v. *United States*, 127 F. Supp. 485, 488 (S.D. N.Y., 1954). Whether a judgment of conviction filed the day before it was pronounced may be given a strong presumption of regularity and be supported by an exhibit (Government's Exhibit 18) not received in evidence poses a problem in the administration of justice with which this Court should be concerned. This is especially so, when the judgment is being utilized to exile a fifty-four-year-old resident of the United States and separate him from his American citizen wife, four American born children, his mother, six American born brothers and two American born sisters.

1. The District Court refused to consider petitioner's claim of entrapment upon the ground that: "Entrapment would not be meritorious in view of his plea of guilty. *Ellison* v. *United States*, 10 Cir., 1960, 283 F. 2d 489; *Kaye* v. *United States*, 6 Cir., 1956, 235 F. 2d 187". *United States* v. *Marcello*, 202 F. Supp. at 697, note 6 (E.D. La., 1962).

This approach and that of the Fifth Circuit in *Mixon* v. *United States*, 214 F. 2d 364 (5th Cir., 1954), is that entrapment may not be raised in a post conviction proceeding.

To the contrary is *Banks* v. *United States*, 249 F. 2d 672, 674 (9th Cir., 1957), which declares that a conviction procured by entrapment:

> "is in violation of the due process provision of the Fifth Amendment and hence the contentions of the server of the sentence are within the Court's jurisdiction in a section 2255 proceeding."

This conflict between the circuits confirms the view of Justice Frankfurter (joined by Justices Douglas, Harlan

and Brennan) that the basis of the defense of entrapment is as much in doubt today as it was 40 years ago. *Sherman* v. *United States*, 356 U.S. at 378 (1958).

In *Sorrells* v. *United States*, 287 U.S. 435, 457 (1932), Justice Roberts (joined by Justices Brandeis and Stone), said:

> "The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention. Quite properly it may discharge the prisoner upon a writ of habeas corpus. Equally well it may quash the indictment or entertain and try a plea in bar. But its powers do not end there. Proof of entrapment, at any stage of the case requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty."

United States v. *Echols*, 253 Fed. 862 (S.D. Texas, 1918) was an entrapment case where the Court refused to accept a guilty plea. In *United States* v. *Heath*, 202 Fed. 349 (D. Mont., 1913), another entrapment case, the Court vacated a judgment upon its own motion and dismissed the indictment.

A plea of guilty does not preclude a claim that a defendant has been deprived of his constitutional right to counsel. An intelligent understanding waiver is required. *Walker* v. *Johnston*, 312 U.S. 275 (1941); *Rice* v. *Olson*, 324 U.S. 786 (1945). If a conviction procured by entrapment violates due process, an intelligent and understanding waiver of this constitutional right should be required before denying petitioner the right to raise this issue. A guilty plea

is not such a waiver.[3] If public policy rather than the Constitution is the source of the refusal to convict an entrapped defendant then the issue is presented whether that public policy is strong enough to permit raising of the issue in a coram nobis proceeding to prevent deportation of one who has already served his sentence. In either event, the issue is one which merits this Court's attention.

2. The District Court applied a burden of proof herein contrary to that approved in other circuits. The court below stated that petitioner's burden "was affected and magnified by lapse of time" (R. 18). Moreover, the trial judge discredited his testimony, *inter alia*, because of his alleged long period of silence (R. 21). This is sharp contrast to the views of the Court of Appeals for the District of Columbia and the Second Circuit.

The burden of proving that his constitutional right to counsel was violated was upon petitioner. *United States* v. *Morgan*, 346 U.S. 502, 512 (1954). He was required to prove his case by a preponderance of the evidence. *Moore* v. *Michigan*, 355 U.S. 161 (1957).

McKinney v. *United States*, 208 F. 2d 844, 846-7 (D.C. Cir., 1953) is contrary to the ruling herein. It involved an attempt in 1953 to set aside a 1938 conviction. The claim was made that the appellant was not represented by counsel and the District of Columbia Circuit said:

> "McKinney's present application for relief comes late in the day; he has served some fifteen years in prison. *But tardiness is irrelevant where a constitutional issue is raised* . . ." (Italics supplied)

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[3] Prior to *Walker* v. *Johnston*, 312 U.S. 275 (1941), it was generally held that a plea of guilty precluded assertion of the claim that an accused had been denied his constitutional right to counsel. *O'Keith* v. *Johnston*, 129 F. 2d 889 (9th Cir., 1942), cert. denied 317 U.S. 680; *Cioffi* v. *Nicholson*, 107 F. 2d 162 (4th Cir., 1939).

United States v. *Morgan*, 222 F. 2d 673 (2d Cir., 1955) is also at odds with the decision below. Morgan was convicted in 1939 but did not file an application for a writ in the nature of coram nobis until 1952. The District Court denied relief because he "had too long slept on his rights" and failed to show his innocence. In reversing, the Court of Appeals observed:

> "The passage of many years does not cure a void conviction. * * * It may be that if a defendant, knowing his right to obtain relief from such a conviction, waited to apply for it until all witnesses other than the defendant have died, he would have a very heavy burden with respect to the facts on which relief must rest. However, we need not here so decide. For here, until February, 1953, when we decided *United States* v. *Morgan*, 2 Cir., 202 F. 2d 67, few lawyers—and surely no laymen like defendant—thought such relief available; and as late as January 4, 1954, four Justices of the Supreme Court believed it was not: see *United States* v. *Morgan*, 346 U.S. 502."

Hagwood v. *United States*, 127 F. Supp. 485, 488 (S.D.N.Y., 1954), presented a coram nobis application to set aside a 1940 conviction. The Court declared:

> "Finally, if laches were to constitute an estoppel or defense, it would in effect make a dead letter of the ancient writ. In most instances where the invalidity of a conviction is asserted on the ground the defendant was deprived of his right to counsel, the facts upon which the infirmity is predicated are in existence and known to the petitioner at or shortly after the entry of the judgment. A defendant is not moved, as this defendant was not, to vacate the allege tainted judg-

ment until its impact has again affected him. . . .
To permit a defense of laches to the writ would, in effect, denude it of one of its essential characteristics —the power to hurdle a time factor."

Until April of 1961, Marcello believed his deportation could not be effectuated. Italy, the only prospective legal receiving country refused acceptance of Marcello. The matter was then in litigation in the Italian courts. Moreover, not until December 20, 1961, was the present outstanding order of deportation entered against petitioner (Tr. 51). In addition, it was not until 1962 that Marcello and his counsel discovered the availability of Chief Probation Officer Seidler as a corroborating witness (R. 271-276).

No evidence has been adduced nor any finding made that petitioner intentionally delayed the institution of this proceeding nor that all witnesses other than Marcello are deceased. See *United States* v. *Morgan*, *supra*. Under the circumstances, it is clear that the Fifth Circuit's decision herein is in conflict with those of the Second and District of Columbia Circuit.

The administration of the proper standard of proof in the federal courts has in the past been a matter of concern to this Court. *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1943). Its proper application in coram nobis cases warrants Supreme Court review.

3. The District Court herein utilized incorrect legal standards in according the judgment of conviction a strong presumption of regularity and in giving conclusive weight to opinion testimony and to an exhibit which was not received in evidence. This precluded a fair hearing on petitioner's coram nobis application. Cf. *Giannopoulos* v. *Robinson*, 247 F. 2d 655, 657 (7th Cir., 1957).

Petitioner claimed and submitted evidence of the Chief

Probation and Parole Officer (R. 172-5, 281), Jerry Wood (R. 182, 302-3), and himself (R. 181, 308-9), that he was not accompanied by counsel when he pleaded guilty on October 29, 1938. The judgment of conviction, Government's Exhibit 18, which was not received in evidence, and the opinion testimony of the Assistant United States Attorney at the time, Judge J. Skelly Wright, were proffered in opposition to this claim.

The evidence adduced herein through handwriting experts and other proofs is undisputed that the judgment of conviction is dated October 29, 1938 (R. 6), but that it contains a filing date of October 28, 1938, in the name and handwriting of Deputy Clerk Lewis (Tr. 26, R. 7). The courts below, however, made no finding as to the filing date herein and in complete disregard of the same accorded the judgment a strong presumption of regularity (R. 29). In so doing, we submit they erred.

We recognize that:

> "The court speaks through the judgment which imports verity when collaterally attacked." *Chapman v. United States*, 247 F. 2d 879, 881 (6th Cir., 1957).

In the instant case the presumption of regularity accompanying the judgment of conviction was destroyed. On its face, the judgment is irregular. If it was filed on October 28, 1938, it was prepared without knowledge of counsel's physical appearance and prior to the events described therein which transpired the next day. On October 29, 1938, Deputy Clerk Lewis certified the judgment as correct, indicating his awareness of that date. It would, therefore, appear that Lewis made no error and that the judgment was in fact prepared on its recorded filing date. This irregularity in the court's records rebuts the presumption of regularity. *People v. Graves*, 206 N.Y. Supp. 2d 433,

11 A.D. 2d 1080 (1960). However, the District Court not only relied upon a strong presumption of regularity but also placed great weight upon an exhibit not received in evidence. The court observed that testimony as to office practice, together with Government's Exhibit 18, "conclusively shows that Warren O. Coleman was present with Marcello as his counsel at the time of sentence" (R. 28).

The parole report, Government's Exhibit 18 (R. 140), was marked for identification (R. 413) but never introduced in evidence. For this reason alone it was error to give conclusive weight to this document.

Judge J. Skelly Wright had no independent recollection of the instant case (R. 24, 413), nor of Government Exhibit 18 (R. 414). He identified Government Exhibit 18, a "Report on Convicted Prisoner by United States Attorney" as a document signed by him on October 29, 1938, and prepared upon the basis of the United States Attorney's file and what happened in the courtroom (R. 414, 425, 436-7). He stated that if he prepared the parole report and judgment "then I had knowledge of the facts contained in them" (R. 424). No testimony was adduced that the report was accurate.

This is a case of past recollection recorded, in view of Judge Wright's lack of independent recollection.

In *Putnam* v. *Moore*, 119 F. 2d 246, 248 (5th Cir., 1941), it was said:

> "The modern doctrine is to permit a witness to testify as to past transactions from a memorandum *that he knows was accurate at the time it was made* although he has no recollection whatever of the original transaction."

Significantly, Judge Wright was never asked to affirm the truth of statements in Government's Exhibit 18 nor did he state that he knew the report to be "accurate at the time it was made." For this reason as well no weight should be accorded the report.

The report does not show that Coleman was present on October 29, 1938, as Judge Wright was forced to admit (R. 425). It merely states, in conformity with Rule 5 of the Eastern District of Louisiana, that Coleman was defense counsel of record.

The report is inaccurate, incomplete and unreliable.

(i) It states Marcello's age as 26 instead of 28.

(ii) The marital status of Marcello is unknown.

(iii) It fails to note that Marcello changed his plea from not guilty to guilty.

(iv) It incorrectly charges marihuana transfers on December 6 and 15, 1938, instead of 1937.

(v) It regards Marcello as a habitual criminal on the basis of one prior conviction (when he was 20 years of age) for which a pardon was granted.

Although Judge Wright had no independent recollection and although the document before him (Exhibit 18) did not so state, he was permitted to testify over objection that

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* After his appearance on May 2, 1938, when Marcello pleaded not guilty, Warren O. Coleman never filed any formal motion for withdrawal as far as the record and docket entries herein reveal. He, therefore, remained attorney of record and continues to be attorney of record although deceased. The rules of the Eastern District of Louisiana, promulgated on September 1, 1919, and in effect in 1938 provided (R. 451):

"Rule 5. Attorney's Withdrawal from Case. The original pleaders or counsel of record, shall be held at all times to represent the parties for whom they appear in the first instance until by formal motion they shall withdraw from the case and their names are taken off the record as such representatives."

Marcello was represented by counsel at the time he pleaded guilty (R. 416). He was likewise permitted to testify that had Marcello not been represented, he would not have indicated such representation in Exhibit 48 (R. 417).

The function of a witness is to bring facts to the attention of the court and not to testify as to conclusions or give opinions, especially where it pertains to the very issues to be decided by the trier of facts.[5] *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 340 (1933); *Thalenhorst* v. *United States*, 119 F. 2d 567, 571 (10th Cir., 1941); *Mutual Life Ins. Co. of N.Y.* v. *Tormohlen*, 118 F. 2d 163, 166 (7th Cir., 1941).

Judge Wright's testimony as to the practice of his office was given conclusive effect by the District Court (R. 28). The usual practice was not followed herein,[6] and evidence as to practice was not established by showing its nature, duration and regularity.

Judge Wright, who became an Assistant United States Attorney in August, 1937 (R. 434), recognized that he could

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[5] The vice of the opinion testimony herein is magnified by reason of its source. The opinion of a Court of Appeals Judge expressed before a District Court undoubtedly has most compelling effect. Chief Judge Christenberry of the District Court, who never appeared before the sentencing judge herein (R. 444), was likewise called as a witness to add his official weight to the Government's case.

[6] (i) If custom were observed, defendant would not have pleaded guilty on a Saturday. The custom was then, as now, to set arraignment for Wednesday (R. 251).

(ii) If custom were observed, Marcello would not have appeared before Court of Appeals Judge Foster. Judge Borah was the regularly assigned District Judge (R. 433).

(iii) If custom were followed, we would not be confronted with an October 29, 1938, judgment containing a filing date of October 28, 1938.

(iv) If custom were followed, we doubt if the government would have requested and been granted an indefinite postponement of a criminal case (R. 153), notwithstanding the constitutional guarantee of a speedy trial.

In this case, therefore, it may not be assumed that routine patterns of conduct were followed.

not pinpoint when the practice of his office began. He testified (R. 423):

> "Q. Your practice was in effect similar to the matters dictated by those (Department of Justice) circulars, is that right?
>
> "A. Well, you're getting into an area now that I am not clear on, because of the date problem. I am telling you simply that these are directions from the Department of Justice, and if they were received by the United States Attorney's Office, they would have followed them out, and they would have come to my attention, and I would have followed them."

Johnson v. *Zerbst*, 304 U.S. 458 (1938), was not decided until May 23, 1938. Thereafter, Department of Justice Circular Letter No. 3141 (Government Exhibit 15, R. 137) was mailed to all United States Attorneys on August 1, 1938 (Tr. 289), noting the importance of "appointing counsel in those cases in which the accused is without counsel" or unable to retain counsel", *Walker* v. *Johnston*, 312 U.S. 275 (1941), and the Government's brief therein reveal that the practice in 1938 did not cover cases where, as here, a defendant pleaded guilty.[7]

If the office practice was exemplified by the aforesaid Circular Letter, it did not cover this case and in any event the practice was only several months old on October 29, 1938.

The federal cases receiving evidence of custom require

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[7] *Cook* v. *Swope*, 109 F. 2d 955 (9th Cir., 1940), involved an accused who pleaded guilty. The Court observed:

> "There is nothing in the law of the land as interpreted by the misread *Johnson* v. *Zerbst* opinion * * * or otherwise, that requires a person free from a disability to have counsel in a United States Court."

exacting proof of regularity of the custom offered as evidence.

In *California Fruit Exchange* v. *Henry*, 89 F. Supp. 580, 586-7 (W.D. Pa., 1950), aff'd. 184 F. 2d 517, the court declared:

> "The existence of a usage or custom can only be proved by numerous instances of actual practices, and not by the opinion of a witness * * *.
>
> "One who would establish a custom or usage has the burden of proving it by evidence so clear, uncontradictory and distinct as to leave no doubt as to its nature and character."

Accord: *Wilson Distilling Co.* v. *Foust Distilling Co.*, 60 F. Supp. 373, 375 (M.D. Pa., 1945).

Commercial Standard Ins. Co. v. *Gordon's Transports*, 154 F. 2d 390, 394 (6th Cir., 1946), states:

> "There can be no doubt of the probative value of a person's habit or custom as showing the doing, on a specific occasion, of the act which is the subject of the habit or custom. 'Sec. 92, Wigmore on Evidence, 3rd Ed.' But as the author points out, 'It is easy to see why, in a given instance, something that may be loosely called habit or custom should be rejected because it may not in fact have a sufficient regularity to make it probable that it would be carried out in every instance or in most instances.'"

Matter of Bonjinoff v. *People*, 299 N.Y. 145, 150, 85 N.E. 2d 909 (1949), is a well known New York coram nobis case which sought to set aside a 1936 conviction. Evidence of custom was likewise adduced. The court noted that this evidence:

> "while not incompetent, constitutes in substance a mere expression of opinion and, in the absence of any reference to the circumstances attending the arraignment of the petitioner, has little or no evidentiary weight and must be disregarded. * * *."

Custom evidence herein does not explain a Saturday arraignment, precisely what occurred before Judge Foster who sentenced Marcello, nor the inscription of an October 28, 1938, filing date on an October 29, 1938, judgment. It does not explain whether defendants who appeared to plead guilty without counsel in 1938 were advised of their right to legal representation.

We cannot assume that a budding custom was followed in 1938 when irregularities in the judgment cast doubt upon it. We cannot assume that a newly formed custom was always followed in 1938 when cases disclose failure to comply with it in 1946 and 1951. *United States* v. *Tribote*, 297 F. 2d 598 (2d Cir., 1961); *United States* v. *Lisker*, 247 F. 2d 496 (2d Cir., 1957). Finally, the dispute as to the meaning and scope of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), prior to *Walker* v. *Johnston*, 312 U.S. 275 (1941), cast grave doubt as to what precise bounds the custom encompassed in 1938. If admissible, the evidence of custom and practice herein was of little or no probative value. Nevertheless, the District Court was conclusively persuaded by this evidence.

The ruling below according a strong presumption of regularity to the judgment and conclusive weight to practice, to opinion evidence, and to an exhibit which was not accepted in evidence, rides rough shod over accepted rules of evidence and deprived petitioner of a fair hearing upon his coram nobis application. He has not been granted a

due process opportunity to attack a judgment which forms the basis for his proposed expulsion from the United States. This should be a matter of deep concern for this Court.

Conclusion

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted

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UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

AINSWORTH, District Judge:

This is a petition for relief in the nature of a writ of error coram nobis filed September 25, 1961, by Carlos Marcello, who seeks to set aside a judgment of conviction on his plea of guilty which was entered on October 29, 1938 (nearly 23 years before) to a charge of violating the Marihuana Tax Act of 1937, 26 U.S.C.A. § 4741 et seq. Marcello contends that on the day of the conviction on his guilty plea he was not represented by counsel and did not waive counsel, in violation of his rights under the Sixth Amendment. He was sentenced to serve a year and a day and the full term of the sentence has long since been served.

Our former opinion in this matter ordering a hearing on the petition is reported in 202 F. Supp. 694. The present petition has significance because Marcello is awaiting deportation as an undesirable alien, the deportation order having been rendered following a prolonged legal battle beginning in 1952, having been initiated under provisions of the McCarran-Walter Act, 8 U.S.C.A. § 1251(a)(11). *Marcello v. Bonds*, 349 U.S. 302, 75 S.Ct. 757 (1955). The deportation order of the Board of Immigration Appeals dated December 8, 1961, is based on the 1938 marihuana conviction. If the conviction is set aside, the deportation order also must necessarily fail. The United States denied the allegations of the petitioner and averred that petitioner was represented by Warren O. Coleman, attorney, at the time of the plea of guilty. Hearings were held by the court without a jury on June 13, 14, 15 and 27, 1962. Final reply briefs were filed October 2, 1962.

The sequence of events pertaining to the present case follows:

On March 28, 1938, Marcello was arrested on the marihuana violation, and appeared with Fred Middleton, at

torneys as his counsel before the United States Commissioner. On April 25, 1938, he was indicted by the Grand Jury on these charges for violation of the Marihuana Tax Act of 1937, the indictment specifying that he transferred 63½ ounces of marihuana to Gilmore Failor (a federal narcotics agent) on December 6, 1937, and 316½ ounces to the Government agent on December 15, 1937. J. Skelly Wright, Assistant District Attorney, signed the original indictment. On May 2, 1938, Marcello pleaded not guilty, appearing with W. O. Coleman, attorney, as his counsel. The case was called on June 6, 1938, and continued indefinitely at the request of Assistant United States Attorney J. Skelly Wright. On Saturday morning, October 29, 1938, Marcello appeared before Circuit Judge Rufus E. Foster, sitting in the district court, changed his plea of not guilty, entered a plea of guilty and was sentenced to serve a year and a day on the charges. The judgment and commitment signed by Judge Foster on the date of sentence recites that the defendant Marcello appeared in person and by counsel, without naming his attorney.[1] The minute entry of the court likewise shows that defendant Marcello appeared with counsel and named Warren O. Coleman as his attorney.[2] Judge Foster, Federal Nar

[1] The judgment and commitment referred to reads in part as follows:

"On this 29th day of October, 1938, came the United States Attorney, and the defendant Carlos Marcello appearing in proper person, and by counsel . . ."

[2] The minute entry reads as follows:

"October 29th, 1938. MAY TERM, 1938.

New Orleans, Saturday, October 29th, 1938.
Court met pursuant to adjournment.
Present: Hon. RUFUS E. FOSTER, Judge.

No. 19234

UNITED STATES OF AMERICA

vs.

CARLOS MARCELLO

"Carlos Marcello, defendant herein, this day appeared in open Court and thru his counsel of record Warren O. Coleman, Esq., asked leave of the Court to withdraw his plea of 'Not Guilty' heretofore

cotics Agent Failor, W. O. Coleman, attorney, and the Clerk of Court Henry J. Carter are now deceased; no stenographic transcript or recording of the proceedings was made and none is available."

The sole issue involved is whether, on October 29, 1938, when Marcello pleaded guilty, he was represented by counsel or he competently and intelligently waived counsel. If not, his conviction must be set aside in these coram nobis proceedings even though the sentence has already been served.

Coram nobis is available to petitioner as a result of the All Writs Section, 28 U.S.C.A. § 1651(a), though such writs were abolished by Rule 60(b) of the Federal Rules of Civil Procedure. This was the holding of the Supreme Court in the leading case of *United States* v. *Morgan*, 346 U.S. 502, 74 S. Ct. 247 (1954), and was the basis on which we ordered a hearing in the present case. However, this decision cautioned us that this extraordinary remedy should be allowed only under circumstances compelling such action to achieve justice where a judgment is final and defendant did not exercise but waived his right of review.

In 1938, the Supreme Court handed down its now celebrated decision in *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S. Ct. 1019 (1938), which held that in all criminal proceedings in federal courts the Sixth Amendment requires that an accused cannot be deprived of his life or liberty unless he has or waives the assistance of counsel. However, the court pointed out in *Zerbst* that a judgment cannot be lightly set aside by collateral attack and when so attacked the judgment of the court carries with it a presumption of regularity. A presumption of regularity attends the judgment of the court when a collateral attack is made upon it. *McKinney* v. *United States*, 208 F. 2d 844 (D.C. Cir.

entered to the Indictment, in the above entitled cause on May 2nd, 1938, which leave was granted by the Court.

"Thereupon the said defendant withdrew his former plea of 'Not Guilty', and pleaded 'Guilty' to the Indictment found and presented against him for violation of the Marihuana Tax Act of 1937.

"Whereupon, it is ordered by the Court that his said plea of 'Guilty' be recorded, and it is done accordingly."

1953), and a heavy burden of proof is cast upon petitioner when he attempts to overcome the presumption of regularity of the judgment of conviction where he faces a deportation as a result of the judgment. *United States* v. *Castelli*, No. 46,369, S.D.N.Y., November 3, 1961, aff'd per curiam No. 27,325 (2 Cir., 1962).

In *Adams* v. *United States ex rel McCann*, 317 U.S. 269, 281, 63 S.Ct. 236 (1942), the Supreme Court said:

> "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation, but as a demonstrable reality."

Petitioner must overcome the presumption of regularity that judges obey the law and will protect fully the rights of persons appearing before them and that judicial proceedings have conformed with due process of law. *White* v. *Reid*, 126 F.Supp. 867 (1954). Petitioner therefore has a severe burden of proof in this case to rebut if he can the strong presumption of regularity of judicial proceedings and judgments rendered therein. Though laches is not available to the United States as a defense to this petition, nevertheless petitioner's quantum of required proof is affected and magnified by the lapse of time as well as the good faith and credibility of the moving party. *United States* v. *Wiggins*, 184 F.Supp. 875, D.D.C. (1960); *Bishop* v. *United States*, 223 F.2d 582 (D.C. Cir., 1955), reversed on other grounds, 350 U.S. 961, 76 S.Ct. 440 (1956).

To support his petition, Marcello offered his own testimony and that of three other persons said to have been in court at the time of his plea of guilty. The Government countered with its offer of the judgment and commitment, court's minute entry, the parole report prepared contemporaneously by then Assistant United States Attorney, now Judge J. Skelly Wright, and the testimony of Judge Wright and Judge Herbert W. Christenberry, Chief Judge of this court (then First Assistant United States Attorney).

Marcello testified that he was represented by Fred Middleton, attorney, at the Commissioner hearing on March 30, 1938, following his arrest on the marihuana charges. After he was indicted he appeared in court on May 2, 1938, for arraignment, accompanied by W. O. Coleman as his counsel, who entered a plea of not guilty for him. He stated that he did not see or communicate again with Attorney Coleman; that he had no funds to fight the narcotics charge and his family had no funds to assist him. He said that an uncle, Frank Tadaro, made arrangements for him to plead guilty, stating that he would get less than a year's sentence; that he told his uncle that he would plead guilty, which he did on October 29, 1938. He said he was accompanied to the court by his brother-in-law Louis Badalamenti and Jerry Wood, a friend. He said that he appeared without counsel on that date before Judge Rufus E. Foster; that Assistant United States Attorney J. Skelly Wright came forward with files and some records and upon Judge Foster asking the defendant how he would plead, he entered a plea of guilty and was sentenced to a year and a day. He testified that he had no attorney and was not advised by the Judge that he could have an attorney; that he saw no reason to hire an attorney since he was going into court to plead guilty and he did not care whether he had an attorney or not, for he felt there was no useful purpose to get a lawyer when he was going to plead guilty.

Petitioner was previously convicted in 1938 on a charge of assault and robbery in a Louisiana state court and received a sentence of 9-14 years. He served a portion of the sentence and was ultimately pardoned for the offense. He awaits deportation now on account of the marihuana conviction involved in the present case. Obviously he has much to gain by the annulling of this conviction, for he would thereby avoid deportation. We have discretion to determine how much weight shall be accorded the obvious self-interest of petitioner for his motivation is undoubtedly very great. Likewise, it is for us to determine the extent his previous conviction in the state court shall be weighed against him. Although petitioner disclaims any connection

with his counsel W. O. Coleman after the date of the arraignment and plea of not guilty on May 2, 1938, this lawyer's firm of Habans and Coleman was counsel for petitioner shortly thereafter in a tax case, having been employed by petitioner's wife while he was still incarcerated in the Atlanta Penitentiary. The signature of Warren O. Coleman, Notary Public, is shown on the petition attesting that of Mrs. Marcello on behalf of her husband. The evidence shows that petitioner made no complaint about his sentence either at the time it was made, subsequently upon admission to Atlanta, on his discharge from the penitentiary, to the probation officer or to anyone else. In the state court prosecution and subsequent petitions to the State Pardon Board for a pardon from the state conviction (all prior to the marihuana conviction) he was invariably represented by counsel. Not even after 1952, when immigration proceedings were instituted for his deportation under the McCarran-Walter Act, did he assert that he was deprived of counsel and did not appear with counsel at the time he pled guilty to the marihuana charge. It was not until September 1961 when the coram nobis petition was filed that we first learned that petitioner contends he was deprived of constitutional rights at the time of his sentence. "The long period of uninterrupted silence concerning his after-discovered injury negatives its existence." *United States* v. *Simon*, 205 F. 2d 59 (2 Cir., 1953); *Obissier* v. *United States*, 315 U.S. 60, 91, 62 S.Ct. 457 (1942).

To support his testimony petitioner also produced the former United States Probation Officer Seidler attached to this court at the time of petitioner's sentence and subsequent probation. Seidler said he did not know Marcello prior to the time of his plea of guilty and sentence; in fact, he did not even know his name until afterwards. He stated that he was in the courtroom on the day of plea and sentence and that Attorney Coleman was not present with petitioner. He found it unusual that the defendant was sentenced without being advised of his right to counsel. Many other details of this courtroom scene which occurred nearly 24 years ago are lost in the witness's memory. We

find it incredible that the details of purported absence of counsel are so well remembered when others attendant thereto are forgotten. The witness handled hundreds of cases in his official position, had no reason to be particularly interested in petitioner's case. He was so vague in his recollection of the courtroom events of that day that he testified that he did not know if there were lawyers at the counsel table. He said there were only two men at the bar, Marcello and Assistant United States Attorney Wright, but there were some other people around as well as a couple of people sitting at the counsel table. He did not know if any of these people was a criminal lawyer. He said he did know that Attorney Coleman was not there but said that there may have been someone else representing the defendant, he did not know. He had only vague memory of his supervision of Marcello on probation after his release from the penitentiary. We cannot accept as true this attempted recollection of events of nearly a quarter of a century ago, when other important details attending the day of the guilty plea and subsequent parole supervision are completely lacking.

Another witness, Jerry Wood, convicted in 1936 and sentenced to a term of three years for violation of the Internal Revenue laws and convicted in 1946 for an O.P.A. violation for which he was fined, testified that he was in court at the time of petitioner's plea of guilty and that though he knew Attorney Coleman, the attorney was not present. Though Wood's prior convictions are somewhat remote, we must consider them in weighing the effect they have upon the credibility of his testimony. He was generally vague and indefinite about what happened in the courtroom on the day of sentence, though he said he did not hear Judge Foster advise Marcello of his legal rights. He said he did not see Attorney Coleman but Coleman could have been there. He didn't know, he only know that he did not see him. He saw some people standing around Marcello at the time of sentence, but he didn't know who they were. The unsatisfactory nature of this testimony is apparent.

Petitioner's brother-in-law testified that he was also

in court at the time of plea and sentence; that he did not know Attorney Coleman and did not see him or any attorney appearing with petitioner at the time. This witness was very confused and mixed up. His recollection was extremely vague and we find no corroboration or support for petitioner in the vague generalities to which he testified.

The United States contends that petitioner's witnesses did not rebut the strong presumption of regularity of the judgment of conviction. It produced the judgment dated October 29, 1938, signed by Judge Foster,[3] which showed that counsel for defendant Marcello was present, though it did not name him; and the minute entry of the court which showed that counsel for defendant was present, naming Warren O. Coleman as attorney.

United States Circuit Judge J. Skelly Wright of the District of Columbia Circuit, former district judge of this court for 13 years and formerly Assistant United States Attorney, testified that he had no independent recollection of the Marcello plea and conviction on October 29, 1938, though it is undisputed that he handled the case and was in court on the day of sentence. The day in question was Saturday on which at that time the United States Attorney's office was then open for a half day. Judge Wright was assigned to the narcotics docket and handled all of such cases. Judge Wright identified the Report on Convicted Prisoner by United States Attorney on Marcello dated October 29, 1938, and bearing Wright's signature and prepared by him, which was sent to the Warden of Atlanta Penitentiary. The report is a routine one, on a Government form, and indicates that the defendant's attorney

[3] The judgment and commitment dated October 29, 1938, was signed by the late Circuit Judge Rufus E. Foster. The strong presumption of regularity is even more apparent now, 24 years later, for we must presume that Judge Foster would not have signed the judgment and commitment stating that Marcello appeared "by counsel" had this not in fact occurred. Judge Foster, of course, is not available as a witness, having died many years ago. It is hardly believable that Judge Foster would have signed the judgment and commitment with an erroneous statement that Marcello appeared "by counsel" had this not been true. Judge Foster undoubtedly would have required that the judgment be changed before signing it had it not recited the true facts which existed at the time of Marcello's plea of guilty.

on the day of plea and sentence was Warren O. Coleman. The Judge testified therefore that the defendant was represented by Warren O. Coleman; that had he not been so represented at the time of his plea of guilty and sentence on October 29, 1938, the parole report would not have so indicated but that portion of the printed form would have been left blank. Judge Wright said he dictated the report on October 29, 1938, after Marcello was sentenced. He also identified the original judgment and commitment and said that the practice of the United States Attorney's office at the time was for the Assistant United States Attorney who handled the case to prepare the judgment and commitment and send it to the Clerk's office in order to have it signed by the Judge. He said therefore that the judgment and commitment was prepared by him and that before its submission to the Clerk's office it was examined by him. He said that the judgment and commitment shows that defendant was represented by counsel at the time of his sentence and had Marcello not been so represented he would not have filled in the form of judgment and commitment showing this fact. Judge Wright further said that had Marcello not had a lawyer in court on that date he would have followed the Department of Justice's instructions as set forth in its circulars relative to providing counsel for the defendant. His invariable practice in the United States Attorney's office was never to prepare an order of judgment and commitment prior to the date the person was sentenced and he said he would have had to have knowledge of the facts to have filled out the parole report and the judgment and commitment, both of which state that Marcello had counsel.

Corroborating Judge Wright was Chief Judge Herbert W. Christenberry of this court, who has been a judge in this district since 1947 and who was First Assistant United States Attorney in 1938. He said that he was familiar with the preparation of parole reports and orders of judgment and commitment and that the practice in 1938 was that these reports were prepared in the United States Attorney's office, dictated to a stenographer, and examined after dictation. He identified the Marcello parole report

and said that if an individual was represented by counsel at the time of sentence a notation to that effect was made on the form as a routine matter. He also identified the judgment and committment form which he stated was prepared by the United States Attorney's office but never prior to the sentencing; that if a defendant had not been represented by counsel at the time of sentencing and had waived counsel, such a fact would appear on the judgment and commitment as would the fact that counsel was present. The practice was to prepare the judgment of conviction immediately after the Assistant United States Attorney came out of court. He said the practice of waiving the right to counsel was the same in 1938 as now. Defendants were told by the United States Attorney orally that they had a right to have counsel to represent them, and if they were not able to employ counsel, the court would appoint one to represent them. If a defendant said he wanted counsel to represent him, the matter was continued until counsel could be appointed. But if counsel was waived, arraignment would be proceeded with immediately. Later the further practice of having a signed written waiver was begun, which is the procedure now. He said that when a defendant was represented by a lawyer and pleaded not guilty and then came in later and changed his plea to guilty, his lawyer was always with him; otherwise, the Judge would not have imposed sentence. This was the routine in such a situation. He had not had proceedings before Judge Foster and he could only state what the procedure was so far as the United States Attorney's office was concerned. That is, if a defendant had a lawyer with him when he entered a plea of not guilty, and then came in later and changed his plea to guilty, his lawyer would be expected to be with him.

Judge Wright, who is still one of the younger federal judges and who has had long experience as a judge and United States Attorney, was unable to recall by independent recollection any of the things which transpired on October 29, 1938, when the defendant pled guilty and was sentenced. But his testimony is clear that she was in charge of all narcotic prosecutions; that he was familiar with the instructions of the Department of Justice in connection with

the necessity of having counsel for a defendant or an intelligent waiver of counsel; and that he prepared the Marcello parole report which bears his signature and which, with his testimony as to the practice of the office, conclusively shows that Warren O. Coleman was present with Marcello as his counsel at the time of sentence. Petitioner contends that the parole form merely lists Mr. Coleman as defense attorney and does not state that he was present at the time. We find no merit to this contention because Judge Wright testified that he would not have filled in Mr. Coleman's name as defense attorney had he not been personally present. The judgment and commitment likewise shows that the defendant Marcello appeared by counsel, and Judge Wright, as part of his duties in the usual practice of his office, must have prepared this judgment. We believe from the evidence that he did and that he would not have filled in the words "by counsel" had Marcello not had counsel present with him at the time of his plea and sentence. Judge Christenberry is equally positive about the practice of the preparation in the United States Attorney's office of parole reports, including the filling in of defense counsel's name if present at the time of sentence, and preparation of judgment and commitment forms where appearance of counsel is noted if present. Likewise, it is certain from Judge Christenberry's testimony that the practice of appointing counsel in 1938 was no different then than now except that where counsel is waived a written waiver is obtained from the defendant. We can only conclude that it was the invariable practice then as now to advise a defendant of his constitutional rights to counsel and that had no counsel been present the plea of guilty would not have been accepted and sentence imposed.

It was proper for the court to receive the testimony of Judges Wright and Christenberry as to the general practice of this court in connection with all defendants in criminal cases either having or waiving counsel. Though Judge Wright who handled the case could actually recall nothing of the occasion, he nevertheless prepared the records in the case, one of which bears his signature, and the general practice of making such records and the usual habit

of the Assistant United States Attorney in respect thereto is properly considered by us. 3 Wigmore, Evidence, § 747, p. 82 (3d Ed. 1940).

Petitioner having undertaken a heavy burden to overcome the strong presumption of regularity of the judgment of conviction has failed in his proof. The evidence of the United States strongly supports the fact that petitioner at the time of his plea of guilty and sentence was accompanied by his counsel, the late Warren O. Coleman. See also the following cases where similar petitions were denied because the presumption of regularity of the judgment was not overcome, there being evidence to support their denial:

United States v. *Embarrato*, 253 F.2d 947 (2 Cir., 1958);
United States v. *DiMartini*, 219 F.2d 807 (2 Cir., 1955);
United States v. *Russell*, 146 F.Supp. 102, S.D.N.Y. (1955);
United States v. *Kliac*, 98 F.Supp. 325, E.D.N.Y. (1951).

The foregoing shall constitute Findings of Fact and Conclusions of Law. Decree accordingly.

s/ Robert A. Ainsworth, Jr.,
United States District Judge.

New Orleans, Louisiana, October 31, 1962.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(March 12, 1964.)

Before HUTCHESON and BELL, Circuit Judges, and BREWSTER, District Judge.

HUTCHESON, Circuit Judge: This is an appeal from a denial of a petition in the nature of a writ of error *coram nobis*. The appellant, Carlos Marcello, seeks to vacate an October 29, 1938 conviction of the Marihuana Tax Act of 1937, on the grounds that on the day of conviction he was not represented by counsel and he did not waive his right thereto.

The district judge denied the petition, writing two opinions in connection with its denial. The first, dated March 9, 1962, is reported as *United States v. Carlos Marcello*, at 202 F. Supp. 694, et seq., the second, from which this appeal comes, at 210 F. Supp. 892 et seq. These two opinions fully and carefully stated and exhaustively canvassed and decided against the movant the question presented by his petition.

The appellant on page 15 of his brief states:

> "The issue presented herein is whether appellant pleaded guilty on October 29, 1938, in the absence of his counsel, Warren O. Coleman, without an intelligent or competent waiver of counsel."

"In summary, appellant's position is that the trial court applied an improper burden of proof; and that his findings were clearly erroneous.

The salient facts are carefully and correctly stated in the two opinions. They may be thus summarized: Carlos Marcello was charged in a two count indictment, returned by the Grand Jury of the United States empaneled, sworn and charged at New Orleans, Louisiana, for violations of the Marihuana Act of 1937. Marcello appeared in open

court with counsel, W. O. Coleman, now deceased, on May 2, 1938, and entered a plea of not guilty. This case was called on June 6, 1938, and continued indefinitely at the request of J. Skelly Wright, who was the Assistant United States Attorney at that time. On October 29, 1938, a Saturday, Marcello appeared in open court changed his plea to guilty before Circuit Judge Rufus E. Foster, and was sentenced to one year and one day by Judge Foster. The judgment and commitment signed by Judge Foster recites that Marcello was represented by counsel at the October 29, 1938 hearing. The minute entry of the court shows that Marcello appeared with counsel, named W. O. Coleman. Marcello has completely served his sentence for violation of the Marihuana Tax Act of 1937. Deportation proceedings were instigated against Marcello, and a deportation order has been rendered against Marcello as an undesirable alien. This deportation order was based upon the 1938 marihuana conviction. The deportation order was rendered after a prolonged litigation ending in the United States Supreme Court, *Marcello v. Bond*, 349 U.S. 302. Marcello attacked the constitutionality of his October 29, 1938 conviction for the first time on September 25, 1961, by a petition in the nature of a writ of error *coram nobis*.

The appellee contends the trial court committed no error in finding that the greater weight of credible evidence, the parole report, the judgment and commitment, and the testimony of Judge J. Skelly Wright and Judge Herbert W. Christenberry, support the presumption of regularity of the judgment and commitment of Marcello.

It is our opinion that the trial court correctly held the appellant had a "severe burden of proof" or a "heavy burden" to overcome the presumption of regularity of the federal court records. The other arguments question the trial court's findings of credibility of the witnesses and weight to be given the evidence. There is evidence in the record to justify the findings.

We find no error in the judgment of the trial court, and it is AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1070

CARLOS MARCELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 31–32) is reported at 328 F. 2d 961. The opinion of the district court (Pet. 19–30) is reported at 210 F. Supp. 892. An earlier opinion of the district court is reported at 202 F. Supp. 694.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1964. On April 13, 1964, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including May 11, 1964. The petition was filed on May 5, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, who pleaded guilty, may challenge his conviction in a coram nobis proceeding on the ground that he was entrapped into transferring marihuana.

2. Whether petitioner sustained his burden of demonstrating that he had not been represented by counsel when he pleaded guilty and was sentenced.

STATEMENT

On March 26, 1938, petitioner, who had been arrested on a charge of illegal transfer of marihuana, appeared before a United States Commissioner with an attorney named Fred Middleton (R. 306, 316). On May 2, 1938, after an indictment charging petitioner with the illegal transfer had been returned, petitioner, who then appeared with Warren O. Coleman as his attorney, pleaded not guilty (R. 9). On June 6, 1938, petitioner's case was continued indefinitely (R. 153). On Saturday morning, October 29, 1938, petitioner appeared before Circuit Judge Rufus E. Foster, sitting in the district court, changed his plea to guilty, and was sentenced to imprisonment for a year and a day. The judgment recites that petitioner appeared in person and by counsel (R. 6–7), and the relevant minute entry names Warren O. Coleman as petitioner's counsel at the time of the guilty plea and sentence (R. 16).

In 1952, proceedings were instituted to deport petitioner on the basis of his 1938 conviction. *Marcello* v. *Ahrens*, 212 F. 2d 830 (C.A. 5), affirmed, 349 U.S. 302. After being deported, petitioner re-entered the

United States (see *Marcello* v. *Kennedy*, 312 F. 2d 874 (C.A.D.C.)), and a second order of deportation was entered in 1961 (R. 10).

In September 1961, petitioner filed a petition for a writ of *coram nobis* to set aside his 1938 conviction (R. i-ii). He claimed therein that his conviction was invalid because he had not been represented by counsel and had not waived the assistance of counsel when he pleaded guilty. He also asserted that he had been entrapped into committing the offenses (R. 4-5, 8-16).

The evidence presented at the district court hearing on the assistance-of-counsel contention is detailed in the opinion of the district court (Pet. 19-30). Petitioner testified that after arraignment he did not again see Mr. Coleman, that he could not afford an attorney, and that he entered a guilty plea after being told by his uncle that he had arranged for him to receive a sentence of less than a year on such a plea (R. 307-308, 343). Former United States Probation Officer Seidler testified that he recalled a Saturday morning in 1938 when petitioner was sentenced for a narcotics violation and that he remembered that petitioner was not represented by Mr. Coleman or by any other attorney (R. 172-175). He said that he remembered this incident because it was unusual to sentence a defendant without advising him of his right to counsel (R. 209-210). A friend of petitioner testified that he accompanied petitioner on that occasion and that he did not see Mr. Coleman in court (R. 182).

The Assistant United States Attorney who prosecuted the case, now Circuit Judge J. Skelly Wright, was a government witness. He had no independent

recollection of the arraignment. He identified his signature on a routine parole report concerning petitioner, dated October 29, 1939, in which it was stated that petitioner was represented by Mr. Coleman at the time of his plea. Judge Wright testified that he would not have written in the report that an attorney was present if petitioner had not been represented at the time of his plea (R. 414–418, 424). Judge Wright also testified that it was the custom of the United States Attorney's Office to prepare the judgment for the court's signature. He said that had petitioner been unrepresented, he would have made a notation to that effect on the judgment as per instructions from the Department of Justice (R. 419–421). The then First Assistant United States Attorney, now District Judge Herbert W. Christenberry, testified that it had been the office's practice to advise any defendant who appeared without an attorney that the court would appoint an attorney for him (R. 443–444). The government also introduced evidence that after petitioner's guilty plea, Mr. Coleman's law firm again represented petitioner in a civil tax matter arising out of possession of the marihuana (R. 376–378).

The district court denied petitioner's motion (R. 13–30). It found that petitioner had failed to overcome the strong presumption of regularity in the judgment. In weighing the testimony of the parole officer, the court stated: "We cannot accept as true this attempted recollection of events of nearly a quarter of a century ago, when other important details attending the day of the guilty plea and subsequent parole supervision are completely lacking" (R. 21–22).

The court also rejected the testimony of petitioner and his friend. The court of appeals affirmed.

ARGUMENT

1. Petitioner may not belatedly litigate an entrapment defense in a collateral attack on his 1938 conviction. *Sunal* v. *Large*, 332 U.S. 174; *Simmons* v. *United States*, 302 F. 2d 71 (C.A. 3); *United States* v. *Spadafora*, 200 F. 2d 140 (C.A. 7); *Turner* v. *United States*, 262 F. 2d 643 (C.A. 8); *Ellison* v. *United States*, 283 F. 2d 489 (C.A. 10), certiorari denied, 365 U.S. 885. Moreover, his plea of guilty foreclosed any such defense. *Kaye* v. *United States*, 235 F. 2d 187 (C.A. 6). *Banks* v. *United States*, 249 F. 2d 672 (C.A. 9), relied upon by petitioner (Pet. 6), is not to the contrary, for it concerned a conviction after a trial at which the defendant had pleaded not guilty and had admitted commission of the offense only because his attorney misled him into believing that an entrapment instruction would be requested. Both before and after that decision, the Ninth Circuit held expressly that entrapment is not a cognizable ground for vacating a conviction in a collateral proceeding. *Black* v. *United States*, 269 F. 2d 38, 42 (C.A. 9); *Stanley* v. *United States*, 239 F. 2d 765 (C.A. 9).

2. Petitioner acknowledges that the burden rested upon him to prove that he did not have counsel at arraignment. The finding of the district court that petitioner had not sustained his burden, which was affirmed by the court of appeals, does not require further review by this Court. Both the sentencing

judge and the attorney who was recorded as having appeared on petitioner's behalf were dead at the time of the hearing (R. 176–177). The lapse of twenty-five years had naturally affected the memories of all living witnesses. The trial judge properly concluded, therefore, that petitioner's burden was "affected and magnified by the lapse of time" (Pet. 22). The remarks in *United States* v. *Morgan*, 222 F. 2d 673 (C.A. 2), and in *McKinney* v. *United States*, 208 F. 2d 844 (C.A.D.C.), upon which petitioner relies (Pet. 8–9), do not relate to the burden of proof but merely state the proposition that a void conviction is subject to collateral attack even after the passage of a substantial period of time.

The evidence offered by the government was properly received. The testimony of Judges Wright and Christenberry regarding the 1938 practice relating to guilty pleas was relevant to the issue raised by petitioner. See *United States* v. *Castelli*, 306 F. 2d 640 (C.A. 2), certiorari denied, 371 U.S. 921; *United States* v. *Di Martini*, 120 F. Supp. 907 (S.D.N.Y.), affirmed, 219 F. 2d 807 (C.A. 2). Involved in this case was the practice in the Eastern District of Louisiana, not elsewhere.[1] Nor is there merit to petitioner's contention that the court should have disregarded

[1] Petitioner claims that the government brief in *Walker* v. *Johnston*, No. 173, Oct. Term 1940, reveals a practice of not appointing counsel where a defendant pleads guilty (Pet. 15). It is true that the government argued in that case that there was a constitutional right to counsel only if the defendant needed aid, a need not usually present if there is a guilty plea. But the brief does not suggest that it was customary practice to deny the assistance of counsel if a guilty plea was expected.

the reference in the judgment to the presence of counsel because the presumption of regularity was rebutted by the erroneous filing date of October 28, 1938 (Pet. 11). The error as to date, does not reflect on the judgment's recital that petitioner had counsel, which was corroborated by the usual practice of the office and the fact that the same attorney later represented petitioner in another related matter.[2]

The fact that the parole report was not formally introduced into evidence (Pet. 11) is without significance. Judge Wright testified as to so much of its contents which bore on the question whether petitioner had counsel (R. 413–422, 437), and he was cross-examined on this report (R. 424–426, 436). The exhibit was, therefore, properly before the court, and it could be considered as if it had been formally admitted into evidence.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[2] In any event, a figure "9" was written either over or under the "8" in "October 28." An expert was unable to determine which figure had been written first (R. 459–466).

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